IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr.A.No.241 of 2006

Judgment reserved on 7.3.2007

Date of decision 14.03.2007

Rajesh Kumar and Joginder Singh — Appellants

Versus

State of H.P. — Respondent

Coram:

The Hon'ble Mr. Justice V.K.Ahuja, Judge.

Whether approved for reporting?[1] yes

For the appellants : Mr.Anand Sharma & Mr.Jagan Nath, Advocates.

For the respondent: Mr.Ashutosh Burathoki, Addl. Advocate General.

V.K.Ahuja, J.

This is an appeal filed by the appellants against the conviction and sentence imposed by the learned Additional Sessions Judge, Solan vide his judgment dated 24.7.2006 and the appellants were convicted to undergo rigorous imprisonment for seven years each and were further sentenced to pay fine of Rs.20,000/- each for the offence punishable under Section 307 read with section 34 IPC. In default of payment of fine both the appellants were ordered to further suffer simple imprisonment for one year each. It was further directed that the amount of fine on realization from the appellants to be paid to the injured.

Briefly stated the facts of the case are that on 12.5.2005 at about 2 a.m. a statement under Section 154 Cr.P.C. was made by Sunil Kumar PW-1 before a police officer. He stated that on 11.5.2005 at about 10.30 p.m. he along with Raman Kumar PW-2 came to the tea shop of Bish Ram after doing agriculture work and Bish Ram and one Gopal Singh were already sitting there and were talking. It was alleged that at that time Rajesh Kumar son of Joginder Singh came with iron pipe in his hand and

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

immediately gave a blow over the head of PW-6 Gopal Singh and also dragged him outside the tea shop. Joginder Singh and Nittu alias Yash Pal who were also accompanying Rajesh Kumar alongwith dandas in their hands started giving danda blows on the person of Gopal Singh and blood oozed out from the body of Gopal Singh who fell down and became unconscious. At that time one Kuldeep Singh came there and the accused persons ran away from the place proclaiming that in case Gopal Singh dies they will join his cremation. The police reached the spot on the telephonic message of Kuldeep Singh and recorded the statement of Sunil Kumar on which a case was registered. After investigation challan was filed before the learned Sessions Judge who assigned the case to the Addl. Sessions Judge, who framed the charge against both the appellants under Section 307 read with section 34 of the IPC. The challan of third accused Nittu alias Yashpal was filed before the children court.

The appellants were tried by learned trial court and on the conclusion of the trial they were held guilty and convicted and sentenced as detailed above. The plea taken by the appellants before the trial court during cross-examination of the witnesses and in statement under Section 313 Cr.P.C. was that of denial that it is a false case based upon enmity. They also took up the plea that injured Gopal Singh PW-6 had suffered the injury at that time by fall since he was intoxicated at that time.

I have heard Mr.Anand Sharma learned counsel for the appellants and Mr.Ashutosh Burathoki, learned Additional Advocate General and have gone through the record of the case carefully.

The submissions made by learned counsel for the appellants were that the evidence of the learned trial court is based upon emotions and not based upon facts. It was submitted that the witnesses are interested witnesses having inimical relations with the appellants. It was also submitted that there are various contradictions in regard to the fact as to when the slap blow was given to third accused Nittu alias Yashpal by PW-6 Gopal Singh injured and the injured sustained fall at that time being

under intoxication. It was also submitted that there are contradictions in regard to the fact as to when Nittu suffered slap blow during day time or at the time of occurrence and there are also contradictions in regard to the fact as to whether Gopal Singh was under intoxication or not. It was also submitted that the recoveries of dandas and iron pipe affected by the appellants cannot be linked with the accused since no disclosure statements under Section 27 of the Evidence Act were recorded by the police before taking these weapons in possession. Another plea raised was that the learned trial court had wrongly recorded the statement of PW-6 Gopal Singh injured by taking his replies in writing though the services of an expert were required as provided under Section 119 of the evidence Act since the witness was deaf and dumb. All these pleas as raised by the learned counsel shall be discussed below while referring to the evidence.

Mr.Ashutosh Burathoki, learned Additional Advocate General has submitted that the contradictions or infirmities referred to in the evidence are minor in nature and do not affect the merits of the case. It was also submitted that there was no proved enmity in between the appellants and the injured and the statement of injured was recorded as provided for under Section 119 of the Evidence Act and it can be legally read in evidence. It was rightly considered by the learned trial court who had not been swayed by emotions but have appreciated the evidence in a proper manner.

Coming to the evidence as mentioned above PW-1 Sunil Kumar was present at the spot who gave his statement under Section 154 Cr.P.C. to the police since the injured had been taken to the hospital. He has clearly stated that he was sitting in the dhaba of Bish Ram along with Raman PW-2 when the accused persons came there. Accused Rajesh Kumar gave blow over the head of Gopal Singh with iron pipe and other two accused Joginder Singh and Nittu gave blows with dandas over the person of PW-6 Gopal Singh. He stated that when Kuldeep came to the

spot, the accused persons ran away from the spot. He had seen the injured bleeding from the injuries sustained by him.

PW-2 Raman has materially corroborated the statement of PW-1 Sunil Kumar in regard to the manner in which the accused persons came, gave blows with danda and iron pipe over the head of the injured. PW-3 Bish Ram the dhaba owner who was sitting with the injured at that time has also materially corroborated the statement of both these eye witnesses. These have been further corroborated by PW-6 Gopal Singh injured.

These statements have been further corroborated by the statement of PW-4 Dr.R.K.Behl, who opined that when application Ex.PW4/A was filed before him, injured was fit to make a statement and his opinion in this regard is Ex.PW4/B. He examined the injured and found lacerated wound on the top of the scalp and he also stated about the other injures 2 to 4 on the person of the injured. He gave his opinion Ex.PW4/C in this regard. He stated that injures 1 and 2 were grievous in nature and injury No.3 was dangerous to life which could result in his death. He stated that these injuries can be caused with iron pipe Ex.P1 and sticks Ex.P3 and P-4 shown to him today in court. He stated that all these injuries are lacerated wound. It was not specifically suggested to him that these injuries can be sustained by fall on a sharp edged weapon.

PW-13 Dr.Navneet Singla, Senior Resident Neuro Surgery from PGI Chandigarh who had also examined the injured had stated that the injured was treated by him. He was unconscious on 12.05.2005 having multiple lacerations on the scalp. He was diagnosed to have severe head injury. He proved the discharge summary Ex.PW13/A. He stated that these lacerated head injury could be caused due to blunt weapon like iron rod and lathi etc. At the time when the patient was discharged on 19.5.2005, his condition was stable but he was unconscious. He admitted that such lacerated injury can be caused by fall on blunt object like uneven surface. This question should have been rather put to the Medical Officer

who firstly examined the injured. Mere admission of this suggestion does not lead to the inference that this injury was sustained by the injured by a fall when there is clear statement of the injured coupled with the testimony of three other witnesses mentioned above who have clearly stated that these injures were caused by the accused persons with iron pipe and sticks and had not been sustained by fall by the injured at the relevant time.

Coming to the contradictions pointed out, the first contradiction pointed out was as to whether the blow with iron pipe was given by accused Rajesh Kumar or by whom. PW-1 Sunil Kumar has clearly stated that Rajesh Kumar was having iron pipe with him while other accused were having dandas with which the blow was given. PW-2 Raman and PW-3 Bish Ram another eye witness also supports the statement of PW-1 Sunil Kumar when they stated that Rajesh Kumar was having a pipe in his own hand with which he gave a blow on the person of Gopal Singh and other accused gave blows with dandas which they were having. The witnesses are unanimous in their statements that the blow with iron pipe/rod was given by accused Rajesh, while other two accused gave blows on the person of the injured Gopal Singh with dandas. Coming to the testimony of PW-6 Gopal Singh injured he has also stated in reply to question No.8 that accused Rajesh Kumar gave beatings with iron pipe and accused Joginder and Nittu with dandas. Thus there is no contradiction in the eye of law and plea raised by the learned counsel for the appellants is devoid of any force and I accordingly repel the same.

Coming to the next contradiction pointed out in regard to the fact as to when accused Nittu was given slap blow by PW-6 or where. PW-1 Sunil has stated that injured did not give slap blow to accused Nittu alias Yash Pal in his presence. He also stated that he cannot say if this blow was given in between 4 to 6 p.m.. PW-2 Ram has stated in this regard that injured Gopal Singh gave slap blow to accused Nittu in his presence which was given before the quarrel. In regard to this slap blow he further stated

that it was given by injured to accused Nittu at nearby road, meaning thereby it was not given at that time when he was sitting inside the tea shop with Bish Ram. He stated that Nittu did not sustain any injury due to slap blow given by injured Gopal Singh and he does not know as to why it was given. He denied the suggestion while giving slap blow to accused Nittu, injured lost his balance and fell on stony surface from the level road. He further clarified that this slap blow was given by injured Gopal Singh to Nittu alias Yash during day time meaning thereby that it was not given at the dhaba or prior to the occurrence.

PW-3 Bish Ram has stated in this regard that no quarrel took place in between Yash Pal and injured on the fateful day. He also denied the suggestion in regard to fall of injured while giving slap blow to accused Nittu.

PW-6 Gopal Singh injured has stated in reply to question No.13 that Nittu had beaten his younger brother when PWs Raman, Sunil and Bish Ram were not here. He stated that he gave slap blow to accused Nittu at the road near dhaba. The statements of all these witnesses suggest that the blow to Nittu accused was given much earlier to the occurrence and at the road side and not in the shop and therefore there is no contradiction in regard to this fact which was not material also.

Coming to the plea if the injured was under intoxication and as such he could not control himself and fell on a stony surface. PW-1 Sunil admitted that injured is a drunkard and he usually takes liquor. He further stated that he never saw the liquor bottle at that time or the injured taking liquor. He stated that he can not say from where the injured took liquor on that fateful night. PW-2 Raman stated that he cannot say if Gopal Singh had consumed liquor alcohol on that night. He also admitted that Gopal Singh usually takes liquor in the village during day time also. PW-3 Bish Ram has stated that Gopal Singh had not consumed liquor on that day. PW-6 Gopal Singh injured stated that he took liquor once only when he

was only 24 years old and denied the suggestion that he usually takes liquor and denied that he had consumed alcohol on that evening.

On this point PW-4 Dr.R.K.Behl who examined the injured has stated that Gopal Singh was smelling of alcohol and further stated that keeping in view the quantity of alcohol which was 103 mg it can be said that the injured was intoxicated.

From above discussion it follows that the evidence lead shows that though the injured may have taken alcohol on that day but that does not lead to the inference that he sustained the injures by fall when there is specific allegation in regard to the injures having been inflicted by the accused persons and they are unanimous in the manner in which these were inflicted by the accused and about the weapon used by the accused persons.

A plea was also raised in record to the recovery of iron pipe and dandas without resorting to the procedure of recording of statement under Section 27 of the Evidence Act. Coming to the statement of Investigating Officer PW-12 Sudhir Kumar he stated that iron pipe Ex.P1 was lying at the spot which was blood stained and was taken in possession. He further stated that dandas Ex.P3 and Ex.P4 were recovered from the house of the accused in presence of Bahesh Ram and Lalit Kumar and out of them one Lalit Kumar has been examined as PW-5 who has corroborated this version. The learned counsel for the appellants has relied upon the decision in **Chandaran vs. The State of Tamil Nadu**, (1978)4 SCC 90 it was held by their Lordships in Section 27 of the Evidence Act that evidence of recovery of incriminating article in the absence of record of the statement cannot be relied upon. Confessional statement leading to the recovery has to be proved. In that case the confessional statement had been recorded by the police leading to the recovery of clothes which were taken in possession and in this context the observations were made by their Lordships. In that case the recovery had been made after 2-3 days

of the murder and the observations made were relevant in the context of the facts of the case.

In the present case the recovery of iron pipe was effected from open place on the next day. The recovery of dandas was made from the house of an accused which was open and can be said to be assessable to others also. The said recovery was effected on the next day and as such it cannot be said that once the iron pipe was lying in a open, the statement of accused under Section 27 of the Evidence Act should have been recorded though in regard to dandas it could have been recorded but since the recoveries were effected in this manner it cannot be said that these cannot be linked with the accused. The recovery of these weapons gives credence to the testimony of the injured and other witnesses and is only a corroborative piece of evidence.

Coming to the plea raised in regard to the enmity and false implication or that the witnesses were interested. It has to be seen as to the nature of enmity and as to whether it was such that the witnesses will conspire together to depose against the accused persons for this enmity. It was suggested to Sunil Kumar PW-1 that Gopal Singh is dead drunkard and he was also a member of gang of drunkard. The other suggestions made were in regard to a case of burning of tent of home guard in which injured Gopal Singh was also one of the accused. But he denied his knowledge in case Gopal Singh was facing trial for the said offence. He also denied his knowledge in regard to other case of beating pending against injured Gopal Singh which suggestions have been put, but not substantiated to discredit the testimony of PW-6 Gopal Singh.

It was suggested to PW-2 Raman also about the involvement of Gopal Singh in the case of burning of tent and he denied his knowledge. He stated that injured Gopal Singh is his further from village relation and similarly accused are also from his village. He denied if he was not on visiting terms with accused and stated that he visits the house of the accused on a function. He denied that there are rival groups in the village

and he and Gopal Singh are from one group, while accused are from other group. PW-6 Gopal Singh injured was suggested that the relations of accused with the family of Sunil Kumar and Raman are strained as well as Bish Ram also which suggestion was also admitted by him, though not specifically admitted by the witnesses themselves.

From the above discussion of evidence it is clear that the relations in between the accused party and injured and witnesses have not been proved to be so strained or inimical that all of them will conspire together and not only the injured will speak falsely against the accused persons, the three eye witnesses examined in the case will also depose falsely so as to settle score with the accused party. The statement of the injured finds due corroboration from the medical evidence which corroborates the manner in which the injures were inflicted upon him and with which weapon and over which part of body it also finds corroboration from other eye witnesses. The enmity or strained relations are not such that all these four eye witnesses, including the injured himself will make out such a false case against the accused persons to settle score with them.

I will make a brief reference to some of the other points raised by learned counsel during the course of arguments. One of the plea raised was as to the light whether it was coming to the shop from adjoining house or there was a candle light or a kerosene lamp kept there. The contradictions mentioned above do not deserve any reference since these were of a very minor nature and this fact cannot be lost sight of that the occurrence took place on 11.5.2005 and the statements of the witnesses were recorded in May, 2006 almost after one year of the occurrence and the human memory can fade on such a minor point due to passage of time and thus this contradiction does not affect the deposition made by the eye witnesses in regard to the occurrence.

Another plea raised was that PW Kuldeep Singh was a material witness who should have been examined and his non examination leads to drawing an adverse inference against him and to substantiate this point

and other point regarding interested witnesses, learned counsel for the appellants relied upon certain decisions.

The decision in **State of Rajsthan v. Mahaveer and others**, AIR 1998 SC 1752, shows that there was enmity in between the parties. The presence of eye witness at the site of occurrence was held to be doubtful and therefore the acquittal was upheld.

The decision in **State of Punjab and Gurmej Singh v. Jit Singh and others,** AIR 1994 SC 549 shows that there were statements of interested witnesses and it was held that their evidence needs to be scrutinized considering the probabilities, past statements and attending circumstances. There was no proper explanation for difference in version which was not forthcoming. The presence of witnesses at scene of occurrence was doubtful and therefore the version of eye witness was found unreliable and the acquittal by Hon'ble High Court was upheld.

The decision in **Ram Narain and ors. vs. The State of Punjab,** AIR SC 1727 was relied upon wherein it was observed that prosecution evidence was inconsistent with medical evidence and that of ballistic expert. The accused was held entitled to acquittal. The facts of these case were entirely different. The observations made in these cases are relevant to this extent that in case of interested witnesses and their presence at the spot, their evidence has to be scrutinized with more care and caution.

Coming to the facts of the case I have already held above that the statements of the witnesses examined do not prove their interestedness or enmity with the accused persons and still the evidence has been appreciated with more care and caution keeping in view some of the suggestions made in regard to the interestedness. However, these suggestions in itself do not prove the interestedness of the witnesses whose presence at the spot has been clearly established from evidence. The learned counsel for the appellants had submitted that the presence of two eye witnesses, namely, PW-1 Sunil Kumar and PW-2 Raman was not

established from the testimony of the injured himself. I agree that the injured has not stated in the first question in regard to the presence of these two witnesses but in further cross-examination and in reply to question No.9, the injured has clearly stated about the presence of Sunil Kumar and Raman who are PWs 1 and 2 respectively as well as the presence of PW Kuldeep Singh. Therefore it cannot be said that the injured has not stated about the presence of PW1 and PW-2 and therefore this plea has been incorrectly raised which deserves to be rejected accordingly. In regard to the plea that Kuldeep Singh was not examined and adverse inference should be drawn against the prosecution. I am not inclined to accept this plea since it is in evidence that Kuldeep Singh came subsequently to the spot and his presence was not established exactly at the time when the accused persons gave blows on the person of the injured. On seeing him the accused persons ran away and therefore he could have only stated about the presence of accused persons and not in regard to the injures and he had given a call to the police and called the police to the spot. Three eye witnesses had been examined and this witness was therefore rightly not examined by the prosecution being of repetitive nature. It is not the number of witnesses that matters but the quality of deposition made by them.

A plea was also raised that the learned trial court has not discussed the evidence of recovery witness. This plea is not tenable. In case the learned trial court has not discussed specifically or in detail in evidence of those witnesses, these can be considered and discussed by this court.

Coming to the last point raised by learned counsel for the appellant in regard to the manner in which the testimony of PW-6 Gopal Singh injured was recorded, he had relied upon the decision in **Kadungoth Alavi** v. **State of Kerala**, 1982 CRI.L.J. 94. In para 13 of the judgment it was observed that the learned Sessions Judge had no assistance of any expert or any person familiar with PW-4 for his examination who was deaf and dumb. It was observed that as the learned Sessions Judge cannot be

expected to have anything more than a layman's knowledge in conversing with a deaf and dumb person. It was highly improper on his part to embark upon the examination of PW-4 without the help of an expert or a person familiar with his mode of conveying ideas to others in day-to-day life.

It is clear that this observation was made in the context that the witness was deaf and dumb and the assistance of an expert was required who could understand the gesture of deaf and dumb person. In the present case a perusal of the statement of Gopal Singh PW-6 shows that the learned trial court has no where observed that PW-6 was a deaf and dumb person. However, after putting some questions to the witness and referring to the testimony of PW-4 Dr.R.K.Behl that the witness has become paralytic due to injuries, it was observed that he had lost the power of speaking due to this reason cannot be ruled out. There was a reference to the statement of medical officer that there are chances of regaining the power of speaking. But it was observed that though the witness was not in a position to speak but being an educated person having studied up to matric standard, he can answer the reply to questions put to him in writing. Thereafter the court resorted to recording of his statement in question answer form. The replies given in writing by him in his own hand were also placed on record by the learned Additional Sessions Judge. Section 119 of the Indian evidence Act reads as under:

> "119. Dumb witnesses.- A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence."

It is, therefore clear that PW-6 was not a deaf and dumb person who could understand the things only by gestures and therefore the assistance of an expert was required. The examination was conducted in the manner laid down in section 119 of the Evidence Act in regard to the dumb witness who could not speak and therefore the learned trial judge had resorted to the practice of recording the replies in question answer

form and filing those replies with the record also. No infirmity can be found in the procedure adopted by learned trial judge in recording the replies in question answer form which can be read in evidence under section 119 of the Evidence Act. The contention put forth in this regard is rejected accordingly.

Another plea taken by learned counsel for the appellants was that the defence version put up by the accused was wrongly rejected by the learned trial judge. I have gone through the evidence of DW-1 Kishan Chand examined by the accused to prove that no occurrence had taken place. The witness may have forgotten the date of death of his mother with which we have no objection, but he is not aware of the landlord to whom he is paying the rent of Rs.20/-. His presence was no where suggested to any of the witnesses of the prosecution and he appears to have been examined as an after thought and his version was rightly rejected by the learned trial judge. No other specific point was urged during the course of arguments.

On appraisal of the evidence in a dispassionate manner and keeping in view all the infirmities and contradictions therein, I am of the opinion that the learned trial judge had rightly come to the conclusion that the guilt of the appellants was established under Section 307 read with section 34 IPC beyond any reasonable doubt and I am in agreement with the findings recorded by the learned trial court in this regard.

On the point of sentence, no arguments were advanced by the learned counsel for the appellants praying for leniency in view of the facts of the case and rightly so. The learned trial court has already taken pittance upon the appellants and sentenced them to rigorous imprisonment for a period of 7 years and to pay fine of Rs.20,000/- each under section 307 read with section 34 IPC. Keeping in view the present condition of the injured as well as his age being 32 years as is apparent from the observation made at the time of his examination as PW-6 in the court, I am of the opinion that the substantive sentence and fine imposed

by learned trial court does not call for any interference by this court and as such the findings recorded by the learned court are liable to be affirmed and are affirmed accordingly. The amount of fine, if realized was rightly directed to be paid to the injured as compensation and as such there is no merit in the appeal. The appeal filed by the appellants is dismissed.

Certified copy of the judgment be sent to both the courts below and the appellants through Jail Superintendent against receipt for information and filing of appeal, if any.

March 14,2007(g) **(V.K.Ahuja),J.**